STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2005
v	No. 248093 Wayne Circuit Court
LOYCE PRYOR, Defendant-Appellant.	LC No. 02-013496

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to eighteen to fifty years' imprisonment. We affirm.

This case arose initially out of Lionel Beauchamp's supposed belief that DuJuan Gilchrist stole his car.[1] According to the testimony of Beauchamp's cousin, Vaudi Higginbotham, Beauchamp offered Higginbotham $500 to kill Gilchrist. Beauchamp and Higginbotham encountered defendant a day or two later, at which time Beauchamp told defendant that Gilchrist had stolen his car. Defendant offered to catch Gilchrist and "bust his head," but Beauchamp told him that Higginbotham would "take care of it." Defendant then offered to help Higginbotham.

Higginbotham testified that, at around 1:30 A.M. on December 22, 2000, he and defendant went to a house where Gilchrist and his fifteen year old cousin, Chaz Richards, along with two other individuals, Michael McGhee and a Robbie "D," were playing dice. Beauchamp arrived about a half hour after defendant and Higginbotham, and then he left with McGhee and Robbie "D," telling Higginbotham to kill Gilchrist while he was gone. Beauchamp returned to the house a short while later, but Higginbotham had gotten scared and had not killed Gilchrist. Beauchamp and defendant then left the house, again telling Higginbotham to kill Gilchrist while they were gone. When Beauchamp and defendant returned, Higginbotham met them on the porch and told

[1] Police were not able to locate Lionel Beauchamp at the time of defendant's trial. The Michigan Department of Corrections website indicates that Beauchamp has since been convicted of one count of murder in the first degree, MCL 750.316(1)(a), and one count of murder in the second degree, MCL 750.317, and sentenced to life imprisonment on July 9, 2004.

them that he did not kill Gilchrist because he was scared and changed his mind. At that time defendant offered to help Higginbotham by holding Gilchrist's arms.

Higginbotham further testified that he, Beauchamp, and defendant then entered the house, where Gilchrist was sitting at the dining room table and Richards was sleeping on the couch in the living room. Defendant approached Gilchrist and, when Beauchamp nodded, grabbed Gilchrist's arms. Higginbotham then shot Gilchrist once in the head with a .357 caliber revolver that had been at Gilchrist's feet, killing him. Beauchamp was in the living room, standing over Richards and holding a .40 caliber semiautomatic pistol. Beauchamp then told Higginbotham to shoot Richards because he was a witness and offered him an additional $500. Higginbotham shot Richards at least three times,[2] killing him also. Defendant and Beauchamp left the house, driving away together. Higginbotham walked away, throwing the gun into a field.

On appeal, defendant claims that the prosecutor committed misconduct, first by improperly introducing evidence that Higginbotham received a plea bargain in exchange for testifying truthfully, and second, by vouching for the credibility of witnesses during closing and rebuttal arguments. Defendant argues that each of these instances of alleged misconduct implied that the prosecutor had special knowledge, unknown to the jury, of what the truth is, thereby denying defendant a fair trial. We disagree.

Where a defendant has failed to preserve his claim of alleged prosecutorial misconduct with a contemporaneous objection and request for a curative instruction, as is the case here, this Court will only review for plain, outcome-determinative error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To satisfy the plain error test, set forth in *People v Carines*, 460 Mich 750, 763; 597 Mich 130 (1999), a defendant must show that:

> ["]1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.["] In addition, defendant must show that the "error resulted in the conviction of an actually innocent defendant" or that the "error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . .'" [*People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), quoting *Carines, supra* at 763.]

Although it is misconduct for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), our review of the prosecutor's remarks shows that he did not do so here. During the prosecution's direct examination of Higginbotham, the prosecutor simply elicited testimony that Higginbotham was testifying pursuant to a plea agreement and that, as part of the agreement, he had agreed to testify truthfully. "Generally, '[b]y simply calling a witness who testifies pursuant to an agreement requiring him to testify

[2] Although Higginbotham testified that he only shot Richards three times, the medical examiner testified that Richards sustained five separate gunshot wounds.

truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity.'" *Id.* at 277 (citation omitted).

Further, we find nothing improper in the prosecutor's remarks during closing or rebuttal arguments. During closing argument, a prosecutor is free to comment on the witnesses' credibility in light of the evidence. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 411 (1997). Additionally, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001) (citation omitted). Here, when reviewed in context, it is clear that the prosecutor's comments on the witnesses' credibility were based on the evidence introduced at trial and did not suggest that the prosecutor had any special knowledge of the truth unknown to the jury. Also, the prosecutor's remarks during rebuttal did not suggest that he had any special knowledge of the truth and were a proper response to defense counsel's closing argument that Higginbotham was lying. We find no error in the prosecutor's conduct at trial, plain or otherwise.

Next, defendant argues that trial counsel was constitutionally ineffective for failing to object to the prosecutor's questioning of Higginbotham about his plea agreement to testify truthfully and to the prosecutor's comments regarding Higginbotham's credibility during closing and rebuttal arguments. We disagree.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

Because we have already determined that the prosecutor did not commit misconduct, defendant cannot establish that he was prejudiced by trial counsel's failure to object to the alleged instances of prosecutorial misconduct. Where a defendant has not established a reasonable probability that the result of the proceedings would have been different, reversal is not warranted. *Id.*

Finally, defendant argues that the trial court abused its discretion in admitting gruesome, prejudicial photographs of the victims, Gilchrist and Richards. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). Specifically, "[t]he decision to admit or exclude photographs is within the sole discretion of the court." *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212 (1995). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of

passion or bias. *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002) (citation omitted). As long as the evidence is pertinent to help establish an element of the crime, or illuminate some facet of the case for the trier of fact, its graphic nature does not render it inadmissible. *People v Eddington*, 387 Mich 551, 562- 563; 198 NW2d 297 (1972). Photographs need not be excluded merely because a witness can testify about the information contained in the photographs; photographs may also be admissible if they corroborate a witness' testimony, and gruesomeness alone will not cause their exclusion. *Id.; Mills, supra* at 76. The proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Mills, supra* at 76. Courts should exclude photographs under MRE 403 if they may lead a jury to abdicate its truth-finding function and convict due to passion. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991).

The photographs at issue here were offered for the purpose of showing (1) that Gilchrist was wearing two pairs of pants in which witnesses testified that he kept money and marijuana, (2) that Gilchrist had been playing dice before the murder, and (3) the position of the hat Gilchrist had been wearing and that a bullet slug was found inside the hat. These were all relevant issues in this case, and the photographs are not excludable simply because a witness can orally testify about the information contained in them. *Mills, supra* at 76. Additionally, the photographs corroborated Higginbotham's testimony. Defendant has failed to meet the "heavy burden" of showing that the challenged evidence should have been excluded as unfairly prejudicial and is, therefore, not entitled to reversal. *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004), lv gtd 471 Mich 913 (2004).

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio